

BLUE MESA ROAD ASSOCIATION
ROY ROMER
WALTER BURKE

IBLA 84-239; IBLA 84-240

Decided September 30, 1985

Appeal from decision of the Montrose District Office, Bureau of Land Management, Colorado, determining rental charges for road rights-of-way C-35394 and C-35395.

Set aside and remanded.

1. Appraisals--Federal Land Policy and Management Act of 1976:
Rights-of-Way--Fees--Rights-of-Way: Generally--Rights-of-Way:
Appraisals--Rights-of-Way: Federal Land Policy and Management
Act of 1976

Where there is evidence an appraisal for a road right-of-way has not been conducted following criteria established for calculating fair market value, a decision imposing the rate may be set aside and the case remanded for further consideration.

2. Appraisals--Federal Land Policy and Management Act of 1976:
Rights-of-Way--Fees--Rights-of-Way: Generally--Rights-of-Way:
Appraisals--Rights-of-Way: Federal Land Policy and Management
Act of 1976

BLM properly requires the holder of a right-of-way for an access road to pay a fair market value rental for the right-of-way granted in accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982). When determining what rights are being granted for a right-of-way along an existing road, the possible existence of a right-of-way established pursuant to the Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982), should be considered.

3. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Appraisals

BLM properly requires the holder of a right-of-way for an access road to pay its fair market rental value in

accordance with sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982), but where the record indicates BLM did not consider whether the holder is entitled to a reduced fee because a valuable benefit is provided to the public by maintenance and improvement of the road, the case will be remanded to BLM to consider that question.

APPEARANCES: Mark Romer, president, Blue Mesa Road Association, for Blue Mesa Road Association; Roy Romer, pro se; Walter Burke, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Blue Mesa Road Association (Blue Mesa), and Roy Romer and Walter Burke appeal decisions dated December 1, 1983, issued by the Montrose District Office, Bureau of Land Management (BLM), which determined rental for road rights-of-way. The rights-of-way had been granted to appellants on December 17, 1982. Because of the close proximity of the two roads, similarity of issues and almost identical statements of reasons, we find it appropriate to consolidate the two appeals.

C-35394 - Blue Mesa Road Association

An application for a right-of-way was filed by Blue Mesa, a Colorado nonprofit corporation, on July 16, 1982. The application states that Blue Mesa sought a 60-foot right-of-way along an existing road whose surface was described as 15 feet wide (25 feet "cut to cut"). It was the stated intent of Blue Mesa to increase the widths of the existing road as much as 5 feet. A copy of a Geological Survey topographic map enclosed with the application indicates the existence of the road and the sections of the road crossing public land in secs. 1, 2, and 11, T. 46 N., R. 4 W., and secs. 25 and 36, T. 47 N., R. 4 W., New Mexico Principal Meridian. The road crosses both public and private land. The four sections of the road on public land that are the subject of the application total approximately 3 miles.

Work papers in the file indicate the existence of the road, the contemplated improvements, and proposed restrictions to be placed in the right-of-way grant. In addition, a formal land report, prepared by BLM on October 4, 1982, gives a detailed description of the road, the environment of the area, environmental consequences of the grant of the right-of-way, a recommendation that the right-of-way be granted, the rationale for the decision, and proposed limitations and special stipulations.

The land report notes the road had been in existence for over 50 years, the total length of the proposed right-of-way was calculated to be 2.38 miles, and the proposed widening would increase the area of the existing road from 5.77 to 17.27 acres. It also noted the road "is also a BLM primary road, as designated in the Gunnison Basin MFP Step III Transportation Plan" (Land Report at 1). ^{1/} The report states that a decision of no

^{1/} "Primary" access roads are designated as being those "roads most heavily traveled and requiring annual maintenance" (Management Framework Plan at 7).

action would "constitute denial of applicant's proposal to upgrade and maintain the existing BLM primary road, which needs maintenance and provides the only access to private and public lands in this area" (Land Report at 1). The report notes BLM road maintenance is done about once every 4 years, "traffic has increased considerably over several years" (Land Report at 2), and the "proposed action [road improvement and maintenance] would have positive economic impacts for the applicant and the general public" (Land Report at 3). Under the heading "Decision Factors" the report states:

The requested right-of-way is over an existing BLM primary road that needs maintenance. The Blue Mesa Road Association was formed to collect fees from its members (real property owners) to improve and maintain its road system. Presently, this road does not receive annual maintenance. By granting the requested right-of-way, this road could receive annual maintenance.

Granting the requested right-of-way is consistent with Federal, State, and local planning documents for this region. Title V of the Federal Land Policy and Management Act of 1976 and the Gunnison Basin MFP Step III L-3 both provide for granting right-of-ways on suitable locations.

(Land Report at 3.) Special stipulation f, as recommended in the report, states the "right-of-way shall remain open to the public" (Land Report at 5).

On December 17, 1982, right-of-way grant C-35394 was issued to Blue Mesa by BLM for a term of 30 years. The grant document states that "\$25.00 has been submitted as a deposit against rental which will be determined by appraisal." Special stipulations were appended to the document as Appendix B, which included the following stipulations:

6. The holder is responsible for preventive and corrective right-of-way maintenance during the term of the grant. This may include blading the roadway, cleaning culverts and ditches, surfacing, or other requirements as directed by the authorized officer.

7. This right-of-way shall be open to the public.

Following a request for a real estate appraisal, an appraisal report was prepared and approved by the District Realty Specialist on November 4, 1983. This report noted that the basis for the appraisal was a previous appraisal report, CO-030-84-1, dated September 1, 1983.

The stated purpose for appraisal CO-030-84-1 was to "estimate the typical fair market value of BLM administered public lands within the Montrose District." The land in the zone involved (051-LG-1) was determined to have a value of \$300 per acre. Based upon this value, an annual rental

rate of \$22.95 per acre per year was calculated to be a fair market rental value. In the November 4, 1983, report, the affected acreage was calculated by determining the length of the road (12,566.4 feet), which was multiplied by the width of the proposed right-of-way (60 feet), and divided by the number of square feet in an acre (43,560). The resultant acreage (17.31) was multiplied by \$22.95 to determine the right-of-way rental (\$397 per year).

On December 1, 1983, a decision was issued, noting the fair market rental for the right-of-way had been determined to be \$397 per year. The decision further stated that rental for the first 2 years was then due in the amount of \$769 (\$397 x 2 less \$25).

Following receipt of the December 1, 1983, decision Blue Mesa submitted the required rental together with a notice of appeal. The following reasons for appeal were stated in the notice:

1. The rental is excessive.
2. BLM personnel told us that the rental would be approximately \$10.00 per year not \$397.00 per year.
3. BLM personnel and members of the public also use the right of way (which the BLM requires that we keep open to the public) but pay nothing while we pay both the costs of maintenance and rental charges.
4. Our right to use the road in question predated the BLM's formal grant of right of way #C-35394(130).

C-35395 - Romer & Burke

A similar application for a right-of-way was filed by Roy Romer and Walter Burke on July 16, 1982. This application also sought a right-of-way to improve an existing road by increasing the width by as much as 5 feet. The Romer-Burke permit application also contained a topographic map which indicated an existing road. The application was for a right-of-way for that portion of the road crossing public lands in sec. 3, T. 46 N., R. 4 W., and secs. 3, 10, and 15, T. 47 N., R. 4 W., New Mexico Principal Meridian. However, the road is not the road subject to the Blue Mesa application. A land report, dated October 5, 1982, was prepared for this application.

The Romer-Burke land report states that "[t]his existing road on public lands is also a BLM primitive road, as designated on the Gunnison Basin MFP Step III Transportation Plan." 2/ In a discussion of the no-action alternative the report states "[a] decision of no action would constitute denial

2/ "Primitive" roads are designated as being those "roads primarily traveled for administrative purposes, and/or 4 wheel drive recreation vehicles. Requiring maintenance every 3 years" (Management Framework Plan at 15).

of applicants' proposal to upgrade and maintain the existing BLM primitive road, which needs maintenance and provides the only access to private and public lands in this area" (Land Report at 2). The report notes the road is "already a part of the transportation system" (Land Report at 2), and stated that widening the 2.60 miles of the existing road would increase its area from 9.45 to 18.91 acres. In a discussion of the existing environment the report states:

The road has been in existence for many 50 [sic] years and has an average road surface 20 feet wide. BLM road maintenance is done about once every four years. Maintenance consists of running a blade over the road to smooth the road surface. Mr. Romer and Mr. Burke own a ranch in this area and are requesting legal access to it.

(Land Report at 2.) In a discussion of the environmental consequences of the grant of a right-of-way the report states that the "proposed action would have positive economic impacts for the applicant and the general public" (Land Report at 3). As a deciding factor the drafters of the report found "[t]he requested right-of-way is over an existing BLM primitive road that needs maintenance. Presently, this road does not receive annual maintenance. By granting the requested right-of-way, this road could provide legal access to adjacent private land owners, plus receive needed maintenance" (Land Report at 3). As rationale for the decision that a right-of-way should be granted, the report stated:

This application is for an existing BLM primitive road (MFP Step III) that needs maintenance. Limited road maintenance (once every four years) is provided by BLM. This roadway is in the most logical location; Gunnison Basin MFP L-3 and Title V of FLPMA of October 21, 1976, both provide for making suitable public lands available for rights-of-way was needed and to stop the proliferation of rights-of-way.

(Land Report at 4-5). The drafters of the report recommended that a special stipulation be appended to the right-of-way grant providing that the "right-of-way shall remain open to the public" (Land Report at 6).

On December 17, 1982, BLM issued right-of-way grant C-35395 to Romer and Burke. The applicable provisions of this document are nearly identical to those found in the Blue Mesa right-of-way grant.

A similar District Realty Specialist determination was made for the Romer-Burke right-of-way, using the same form and Appraisal CO-030-84-1 as a basis for the rental. The acreage was calculated as 13,728 feet x 60 feet, or 18.91 acres. The average annual rental was determined to be \$434 (18.91 x 22.95 (rounded)).

On December 1, 1983, a decision regarding the yearly rental was sent to Romer and Burke. The decision stated that the "[f]air market rental for the

right-of-way has been determined to be \$434 per year." A balance of \$843 was noted as being due and payable.

Romer and Burke subsequently tendered payment of the \$843 together with a notice of appeal. The reasons for appeal stated in the notice are almost identical to those stated by Blue Mesa.

[1] Appraisals of rights-of-way will be upheld if there is no error in the appraisal methods by BLM or appellant fails to show convincing evidence that the charges are excessive. Clinton Impson, 83 IBLA 72 (1984); Donald R. Clark, 70 IBLA 39 (1983). However, this Board has held that where a BLM appraisal has not followed criteria established for calculating the fair market value of rental for a right-of-way, the case will be remanded to BLM for further consideration. Clinton Impson, *supra*. In this case it is apparent that the appraisals of the rights-of-way improperly applied or relied upon the September 1, 1983, Appraisal CO-030-84-1.

While the calculations were made in accordance with the general determination made in Appraisal CO-030-84-1, certain qualifying statements contained in that report were overlooked. That appraisal was to be used "only on public land parcels of 35 acres or larger" (CO-030-84-1 at 3). The schedules in CO-030-84-1 were to be used "only with typical rights-of-way with no atypical [encumbrances] on fee and no severance damage or special benefits to the remainder" (CO-030-84-1 at 4). "The typical public lands to which this appraisal is applicable are vacant and unimproved" (CO-030-84-1 at 5). Finally, under the topic "Overlapping Rights-of-Way," the Appraisal noted:

Where subsequent rights-of-way substantially overlap (i.e., an overlap of 50 percent or more of width) a prior and paramount right-of-way, the value of rights granted should reflect the difference in before and after land values immediately before issuance of the subsequent grant. Valuation necessarily requires consideration of the prior rights granted and the estimated remainder of the fee estate held by the grantor.

(CO-030-84-1 at 15.)

[2] When determining whether there was an error in the appraisal one must also ascertain the nature and extent of the estate subject to the right-of-way. In order to do so two factors must be considered. The first is the nature of the estate. There is no question the lands subject to the rights-of-way are public lands. The second factor is the extent to which the land may be encumbered by other rights. The record indicates that roads over the public lands for which appellants have been granted rights-of-way have existed for many years. The existing road that the Blue Mesa right-of-way expanded is described in the land report as a BLM primary road 3/ while the

3/ A public right-of-way may have been created along the roads subject to this appeal by public use, in accordance with the provisions of the Act of

existing road expanded by Romer and Burke is described as a BLM primitive road that is shown on the plat map as an access road created in accordance with 44 L.D. 513 by action C 0118259. 4/

If a public right-of-way has been created pursuant to R.S. § 2477 or other authority, the existence of such a right-of-way would have a direct bearing on the extent and nature of the rights which could be granted by BLM when issuing the right-of-way to appellants pursuant to FLPMA. The record before us is not sufficient to make a determination regarding the existence or extent of a R.S. § 2477 right-of-way, so we must remand this case for consideration of this matter at the District level. If it is determined that a R.S. § 2477 right-of-way exists, its extent should be taken into consideration when calculating the fair market rental value of the rights-of-way granted to appellants under FLPMA.

Section 501 of FLPMA, 43 U.S.C. § 1761 (1982), provides that the Secretary is authorized to grant a right-of-way over public lands for the

fn. 3 (continued)

July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1982) (referred to as R.S. § 2477). As a general rule, a determination of the existence of a R.S. § 2477 right-of-way will not be made by the Department. The policy behind this rule was set forth in Alfred E. Koenig, A-30139 (Nov. 25, 1964):

"The question as to whether a road is a public highway is determined by the law of the State in which the public land is located; therefore this Department has considered State courts to be the proper forum for determining whether there is a public highway under that section of the Revised Statutes and the respective rights of interested parties."

(Alfred E. Koenig, *supra*, at 3). There is, however, an exception to this general rule. In Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976), this Board examined the effect of construction and public use of a road across public land prior to the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), which repealed R.S. § 2477, subject to valid existing rights established at the time of enactment. In a later decision, Nick Dire, 55 IBLA 151 (1981), the Board found that administrative necessity required an adjudication of R.S. § 2477 rights-of-way questions. These cases found that, where there is an "administrative concern" requiring a determination of the existence of a R.S. § 2477 right-of-way, it is proper for BLM to make a decision concerning what would, otherwise, be a matter for determination by a state court. As stated in Meeds, "it is appropriate that the Bureau review the propriety of its action for its own purposes * * *." Meeds, *supra* at 298-99, 83 I.D. at 323. Thus, where a duty imposed upon BLM by statute or regulation will be furthered by an adjudication of a R.S. § 2477 right-of-way, such an inquiry may be made by BLM. When making the inquiry, the Department should apply the law of the State in which the lands are located. *See, e.g., Leach v. Manhart*, 77 P.2d 652 (Colo. 1938).

4/ 44 L.D. 513 (1916) provides instructions for applying the appropriation act of Mar. 4, 1915, ch. 144, 38 Stat. 1086, 1100. It is possible this road was created in accordance with these instructions because it had previously been an R.S. § 2477 road. The record does not provide its history.

purposes of "roads." In addition, section 504(g) FLPMA, 43 U.S.C. § 1764(g) (1982), requires that the holder of a FLPMA right-of-way "shall pay annually in advance the fair market value thereof as determined by the Secretary granting * * * such right-of-way." Appellants contend they should not be required to pay a rental charge for use of the access road because no rental has been charged in the past. While, if a R.S. § 2477 right-of-way exists, appellants would not be required to pay a rental charge for its continued use, appellants seek to do more than enjoy continued use of an existing right-of-way. They seek to expand that right-of-way, improve the road, and assure the continued use of the expanded right-of-way. In return appellants must pay rental for that expanded use. Payment of an annual rental for the rights acquired by issuance of the right-of-way at the fair market value is mandated by section 504(g) of FLPMA.

[3] Appellants also argue that maintenance of the road should be set off against the rental charge. We note appellants are required, pursuant to section 502(c) of FLPMA, 43 U.S.C. § 1762(c) (1982), and under the terms of the right-of-way grant, to maintain the right-of-way. Such maintenance is to be only "commensurate with the particular use requirements" of appellants. Id.

However, section 504(g) of FLPMA does provide for certain instances in which the Department may charge a reduced fee or no fee for a FLPMA right-of-way. See also 43 CFR 2803.1-2(c). One instance in which appellants may be entitled to a reduced fee is "[w]hen a holder [of a right-of-way] provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." 43 CFR 2803.1-2(c)(3). As noted, supra, appellants' right-of-way grants required them to reshape the road surface, install ditches, waterbars, and culverts, reseed disturbed areas following road improvement, and maintain the road during the term of the right-of-way.

The BLM Transportation Plan states that a primary road should be maintained yearly and a primitive road should be maintained every 4 years. The field report indicates the Blue Mesa road is not being maintained annually (Land Report at 2) and that granting the requested right-of-way would result in yearly maintenance. The Romer-Burke field report also notes that "[b]y granting the requested right-of-way this road could * * * receive needed maintenance" (Land Report at 3). The rights-of-way granted were non-exclusive and the grant documents reserve the right to require common use of the right-of-way. To the extent this maintenance benefits the public, there may be a valuable benefit within the meaning of 43 CFR 2803.1-2(c)(3). There is no evidence that BLM considered the question of reduced fees for this reason. 5/ See William F. Bieber, 82 IBLA 6 (1984).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the

5/ However, under no circumstance would appellants be entitled to no fee, consistent with the intent of Congress in enacting section 504(g) of FLPMA, supra. See Bench Lake Irrigation Co., 78 IBLA 305, 308 (1984).

Montrose District Office are set aside and the cases are remanded to BLM for further consideration consistent with this decision.

R. W. Mullen
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Franklin D. Arness
Administrative Judge

